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No. 00-97

IN THE
SUPREME COURT OF THE UNITED STATES

LOIS A. ADAMS, ET. AL., Appellants,

v.

WILLIAM JEFFERSON CLINTON, ET AL., Appellees.

On Appeal from a Final Order of a Court of Three Judges
of the United States District Court for the
District of Columbia

MOTION OF APPELLEES, THE CLERK AND SERGEANT AT ARMS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, TO AFFIRM

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QUESTIONS PRESENTED

1. Do appellants lack Article III standing to maintain their claims against the Clerk and Sergeant at Arms of the United States House of Representatives where those officers have not caused appellants to be unable to vote for a Representative to the House and where the relief sought against those officers would not enable appellants to vote for a Representative to the House?

2. Did the three-judge District Court correctly dismiss appellants' apportionment claims for failure to state a claim?

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MOTION OF APPELLEES, THE CLERK AND SERGEANT AT ARMS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, TO AFFIRM

Pursuant to Rule 18.6 of the Rules of the Supreme Court, appellees Jeff Trandahl and Wilson Livingood—the Clerk and Sergeant at Arms, respectively, of the United States House of Representatives (collectively, "House Officers")—respectfully move for an order affirming the three-judge District Court's judgment as to them on the alternative ground (not reached below) that appellants lacked standing to sue the House Officers. Alternatively, the House Officers move for an order affirming the judgment on the merits below.

OPINIONS BELOW

The opinion of the three-judge District Court appears at 90 F. Supp.2d 35 (D.D.C. March 20, 2000). Judge Oberdorfer's separate opinion, dismissing appellants' non-apportionment claims, appears at 90 F. Supp.2d 27 (D.D.C. March 20, 2000).

JURISDICTION

The decision of the three-judge District Court was entered March 20, 2000. Appellants filed their Notice of Appeal on May 17, 2000, and their Jurisdictional Statement on July 17, 2000, invoking the jurisdiction of this Court under 28 U.S.C. § 1253. The Clerk of the Court extended to September 13, 2000, appellees' time to move to dismiss or affirm. This Court lacks jurisdiction as to the House Officers because appellants lacked Article III standing to sue the House Officers, as explained below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, § 2 of the Constitution provides in pertinent part that

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . .; [and] to Controversies to which the United States shall be a party . . . .

Section 2a of Title 2 of the United States Code provides in pertinent part that

> (a) . . . the President shall transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.
>
> (b) Each State shall be entitled . . . to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section.

STATEMENT OF FACTS

The Statement of the Case in appellants' Jurisdictional Statement does not include the facts germane to the Court's consideration of the jurisdictional issues raised in this motion. Accordingly, we set forth those facts here.

Factual and Procedural Background

The *Adams* appellants are 17 District of Columbia residents. They claim to be aggrieved by (1) Congress' failure to exercise its constitutional authority over the District in a manner identical with the constitutional authority Congress exercises over federal enclaves (which, appellants say, violates their equal protection rights), and (2) Congress' continued exercise of exclusive federal authority over the District (which, appellants say, violates their constitutional right to a republican form of government). Complaint at ¶¶ 37-87, 88-118 (June 30, 1998) (App. F-8 to F-21). Appellants seek in this action—through various extraordinary forms of declaratory and injunctive relief—to force Congress (which is not a party) to pass, and the President to sign, legislation which either grants statehood to the District of Columbia or reunifies the District with an existing state (unspecified, but presumably Maryland). *Id.* at 25- 28, ¶¶ C.1.a, 1.b, 2.a, 2.b, 3, 4 (App. F-24 to F-28). To obtain a three-judge District Court, appellants characterized their claims—successfully—as challenges to "the constitutionality of the apportionment of congressional districts" under 28 U.S.C. § 2284(a). *See* Plaintiffs' Application for a Three-Judge Court (June 30, 1998); Memorandum (Nov. 6, 1998) (Oberdorfer, J.) (App. G-1 to G-10) (granting application for appointment of three-judge District Court, pursuant to § 2284(a)).[1]

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[1] *Adams* was consolidated below with *Alexander v. Mineta* (originally *Alexander v. Daley*), which was filed by another group of District (continued...)

The *Adams* appellants sued the President and the District of Columbia Financial Responsibility and Management Assistance Authority (the "Control Board"), in addition to the two House Officers whose duties and responsibilities are prescribed by statute and House Rules. In an effort to bolster their Article III standing claim, appellants alleged various acts and omissions on the part of the House Officers which apparently were intended to suggest that the House Officers are in some manner responsible for appellants' grievances. These standing allegations fall into two categories: those that relate to the apportionment process, and those that relate to the House Officers' responsibilities to elected Representatives.

Standing Allegations Related to the Apportionment Process. The Clerk is responsible, pursuant to 2 U.S.C. § 2a(b), for transmitting to the executive of each State, following the decennial census, a certificate of the number of Representatives to which each State is entitled, as determined by the President and reported by him to Congress pursuant to 2 U.S.C. § 2a(a). The *Adams* appellants do not challenge the validity or constitutionality of 2 U.S.C. § 2a, but allege that in carrying out this responsibility, the Clerk

> has certified to the chief executive of each State the number of Representatives apportioned to the State, which apportionments have included the populations of all federal enclaves and of the former portion of the District of Columbia south-west of the Potomac River.
>
> [but] the apportionments certified by [the Clerk] have not accounted for and included

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[1] (...continued.)
residents and the District of Columbia itself, and which also seeks broad and far-reaching declaratory and injunctive relief. The *Alexander* plaintiffs have also appealed to this Court (No. 99-2062).

> population of the District of Columbia and no representation under the terms of Article One and Amendment Fourteen . . . has been apportioned to the District of Columbia in the [Clerk's] certifications.

Complaint at ¶¶ 79, 80 (App. F-15). *See also id.* at ¶ 114 (App. F-21).

It is undisputed in this case that "[i]n carrying out this responsibility [under 2 U.S.C. § 2a(b) to transmit apportionment certificates], the Clerk does not determine the number of Representatives to which each State is entitled. Rather, the Clerk's responsibility is limited to *informing* the executive of each State of the number of Representatives to which the State is entitled, as shown in the President's statement." Declaration of Robin H. Carle at ¶ 2 (Dec. 17, 1998) ("Carle Declaration") (emphasis added), attached as Exhibit A to House Officers' Response and Objections to Plaintiffs' Statement of Undisputed Facts (Dec. 18, 1998).[2]

Standing Allegations Related to House Officers' Responsibilities to Elected Representatives. The Complaint also advanced two additional allegations which suggest that the House Officers would not treat as a duly elected U.S. Representative a hypothetical Member from the District of Columbia:

1. *The Clerk.* The Clerk is responsible for making, at the beginning of each Congress, the roll of Representatives-elect whose credentials show that they are elected in accordance with the laws of their States or the United States, pursuant to 2 U.S.C. § 26. Appellants do not challenge the

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[2] At the time the Complaint was filed, Robin Carle was Clerk of the House. Jeff Trandahl, the current Clerk, was elected to that position by the full House on January 6, 1999. 145 Cong. Rec. H6-05 (1999).

validity or constitutionality of 2 U.S.C. § 26, but allege that in carrying out this responsibility, the Clerk

> include[d] representatives elected from congressional districts which include the populations of all federal enclaves and from the congressional district including the former portion of the District of Columbia south-west of the Potomac River.
>
> [but has] not included representatives of the citizens of the District of Columbia . . . .

Complaint at ¶ 82-83 (App. F-15). *See also id.* at ¶ 115 (App. F-21).

It is undisputed in this case that "[i]n carrying out [his] responsibilities under 2 U.S.C. § 26, [the Clerk] do[es] not determine . . . . whether any particular individual is entitled to be recognized as a Member of the House. . . . That determination would be made by the House itself." Carle Declaration at ¶ 3.

2. *The Sergeant at Arms.* The Sergeant at Arms is responsible for controlling access to the floor of the House, pursuant to 2 U.S.C. § 78 and House Rules II.3 and IV.2 - .5 (formerly House Rules IV and XXXII). Appellants—who do not challenge the validity or constitutionality of 2 U.S.C. § 78, House Rule II.3 or House Rule IV.2 - .5—allege that in carrying out this responsibility, the Sergeant at Arms

> has admitted to the Hall of the House for sessions of the House Representatives on the Rolls of [the Clerk] . . . .
>
> [and] has enforced Rolls which have included Representatives elected from congressional districts which include the populations of all federal enclaves and from the congressional

> district including the former portion of the District of Columbia south-west of the Potomac River, but which Rolls have not included representatives of the District of Columbia . . . .

Complaint at ¶¶ 85, 86 (App. F-16). *See also id.* at ¶ 116 (App. F-21).

It is undisputed in this case that the Sergeant at Arms does "not independently determine who are the Members of the House entitled to be admitted to the Hall of the House as Members. Rather, in determining who to admit to the Hall of the House as a Member, [the Sergeant at Arms] rel[ies] on a list of Members provided . . . by the Clerk of the House." Declaration of Wilson Livingood at ¶ 3 (Dec. 16, 1998) ("Livingood Declaration"), attached as Exhibit B to House Officers' Response and Objections to Plaintiffs' Statement of Undisputed Facts (Dec. 18, 1998).

The *Adams* appellants seek extraordinary forms of injunctive relief designed to shut down the Congress, and significantly restrict the President's exercise of his constitutional authority, in order to force Congress to pass, and the President to sign, legislation that appellants deem desirable. With respect to the House Officers, specifically, appellants asked the District Court to

> [enjoin the Clerk, in carrying out his responsibilities under 2 U.S.C. § 2a(b), to] not certify to any State [more than one] Representative[] . . . *until such time as the District of Columbia . . . is admitted as a sovereign State on equal footing with all other sovereign States . . . or until such time as the District of Columbia . . . is unified with a previously-existing sovereign State* . . . .

Complaint at 26, ¶ C.2a (App. F-25 to F-26) (emphasis added);

> [enjoin the Clerk to] not enroll as members of the House of Representatives any more than [one Representative for] . . . each State . . . *until such time as the District of Columbia . . . is admitted as a sovereign State on equal footing with all other sovereign States . . . or until such time as the District of Columbia . . . is unified with a previously-existing sovereign State . . . .*

Id. at 27, ¶ C.2b (App. F-26) (emphasis added); and

> [enjoin the Sergeant at Arms to] not admit to the Hall of the House of Representatives for sessions of the House any more than [one Representative for] . . . each State . . . *until such time as the District of Columbia . . . is admitted as a sovereign State on equal footing with all other sovereign States . . . or until such time as the District of Columbia . . . is unified with a previously-existing sovereign State . . . .*

Id. at 27-28, ¶ C.3 (App. F-27) (emphasis added).[3]

The Decisions Below

The House Officers moved below to dismiss the Complaint for lack of standing and failure to state a claim, among other grounds. On March 20, 2000, the three-judge District Court granted the defendants' (including the House Officers') motions to dismiss "with respect to those claims that challenge the constitutionality of the apportionment of the

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[3] The *Adams* appellants seek similar relief against the President. *See* Complaint at 25-26, ¶¶ C.1a., C.1b (App. F-24 to F-25).

House of Representatives." Memorandum Opinion at 77 (March 20, 2000) (App. A-61). *See also* Judgment at 2 (March 20, 2000) (App. B-2). The dismissal appeared to be based on the *Adams* appellants' failure to state a claim, although the Court did not expressly state the ground for its ruling.[4]

The three-judge Court remanded to Judge Oberdorfer, to whom the case had originally been assigned, all remaining claims (*i.e.*, the claims against the Control Board and the non-apportionment claims against the President). Memorandum Opinion at 77 (March 20, 2000) (App. A-61); Judgment at 2 (March 20, 2000) (App. B-2). Judge Oberdorfer then dismissed those claims. *See* Memorandum at 10-13 (March 20, 2000) (Oberdorfer, J.) (Control Board); Memorandum (April 27, 2000) (Oberdorfer, J.) (President).

The three-judge Court side-stepped the House Officers' standing arguments. It did not discuss, or even mention, the Sergeant at Arms. With respect to the Clerk, the Court concluded that it need not determine whether he was subject to suit because appellants had standing to sue another defendant in the *Alexander* case (although not in the *Adams* case), namely the Secretary of Commerce. *See* Memorandum Opinion at 16, 19 (App. 14a, 17a). *See also* Memorandum at 2, 9 n.7 (March 20, 2000) (Oberdorfer, J.)

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[4] Although the *Adams* Complaint articulates an equal protection claim (Count One) and a Guaranty Clause claim (Count Two)—each asserted against all four defendants—the three-judge Court diced the Complaint somewhat differently. It construed the *Adams* claims as being either apportionment-related (and therefore within the jurisdiction of the three-judge Court) or non-apportionment-related (and, therefore, not within the jurisdiction of the three-judge Court). *See* Memorandum Opinion at 5-7, 68 n.63 (App. A-4 to A-6, A-54); Judgment at 1-2 (App. B-1 to B-2). The Court appeared to deem all claims against the House Officers to be "apportionment-related," and therefore dismissed them, as noted above.

(App. 147a, 154a) (confirming that three-judge Court affirmatively found standing only as to Secretary of Commerce). In deciding the case on the merits without resolving the standing questions as to the House Officers, the lower court implicitly applied to the House Officers the "doctrine of hypothetical jurisdiction" which this Court rejected in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998).

ARGUMENT

I. The District Court's Judgment Should Be Affirmed as to the House Officers Because Appellants Lacked Article III Standing To Sue Them.

Federal court jurisdiction is limited by Article III, § 2, of the Constitution to "cases" and "controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Justiciable cases and controversies must be "definite and concrete, touching the legal relations of parties having adverse legal interests. . . . admitting of specific relief through a decree of a conclusive character . . . ." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937). To satisfy Article III, appellants must have standing which requires:

> First . . . an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" . . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant . . . ." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted). Appellants bear the burden of establishing the existence of standing, *id.* at 561; *Steel Co.*, 523 U.S. at 104; *Warth v. Seldin*, 422 U.S. 490, 518 (1975), inquiry into which must be "especially rigorous" when, as here, "reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

Appellants' Complaint does not specifically articulate an Article III "injury." Instead, we—like the Court below—have assumed throughout this proceeding (in light of the relief sought) that appellants' inability to vote for Representatives is their injury and that this inability constitutes "injury in fact" for Article III purposes.[5] However, the House Officers plainly have not caused, and cannot redress, appellants' inability to vote for Representatives. Therefore, appellants lack standing to sue the House Officers.

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[5] From time to time, the *Adams* appellants have suggested—or seem to have suggested—that the inability to vote for Representatives is not their Article III injury. For example, appellants asserted in the lower Court that they "make no claim based upon voting rights arising from the equal protection provisions of the Constitution . . . ." Motion to Alter or Amend Memorandum and Order Consolidating the Cases, with Points and Authorities Incorporated at 2 (Nov. 12, 1998). More recently, they asserted, in opposition to President Clinton's motion to stay their D.C. Circuit appeal, that "Appellee Clinton states that [the *Adams*] Appellants 'challenge their inability to vote in congressional elections' . . . . [T]his characterization is not accurate . . . . Plaintiffs/Appellants *Adams* challenge Congress' failure to treat them in the same way Congress has treated all other, similarly (or identically) situated people who reside under Congress' exclusive jurisdiction." Opposition to Appellee Clinton's Motion to Hold Appeal in Abeyance at 5 (Aug. 31, 2000), in *Adams v. Clinton*, No. 00-5239 (D.C. Cir.). If the inability to elect Representatives is not appellants' Article III injury, then we are at a loss to know what is.

Recently, this Court made clear that "'[w]ithout jurisdiction [a] court cannot proceed at all . . . .'" *Steel Co.*, 523 U.S. at 94 (quoting *Ex Parte McCardle*, 74 U.S. 506, 514 (1868)). This is true as to each defendant in a multiple-defendant case.[6] Accordingly, because the *Adams* appellants so clearly lack Article III standing as to the House Officers, the Court should affirm, on this alternative ground, the District Court's judgment in favor of the House Officers.

A. Appellants Lacked Standing To Sue the Clerk in His Role as Transmitter of Apportionment Certificates.

1. *The Clerk's Transmission of Apportionment Certificates Does Not Cause Appellants' Injury.*

Appellants allege that the "apportionments certified by [the Clerk] have not accounted for and included population of

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[6] *See, e.g., Lowry v. Apfel*, No. CV-99-1210-ST, 2000 WL 730412, at *15 (D. Or. March 2, 2000) (plaintiff must allege elements of Article III standing as to each defendant; dismissing for lack of standing as to two of three defendants).

While a Court need not determine whether every *plaintiff* has standing once it determines that at least one plaintiff does—*see, e.g., Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)—that is quite different from not resolving, as the Court below did not, the standing issue as to each *defendant* merely because a plaintiff has standing to sue at least one defendant. Unlike plaintiffs, defendants do not normally wish to be parties to a case. Therefore, failing to resolve the standing question forces an unwilling party to defend an action against it, even though the Court may lack jurisdiction over that defendant. Furthermore, in the event of a plaintiff's judgment, questions would inevitably arise about the scope and effectiveness of relief if a Court had failed to resolve the standing issue as to each and every defendant. Finally, failing to determine standing as to a particular defendant in one case may well have the effect of subjecting that defendant to subsequent suits, suits to which the defendant would not have been subjected had the standing question been resolved in his favor in the first case.

the District of Columbia and no representation . . . has been apportioned to the District of Columbia in the [Clerk's] certifications." Complaint at ¶ 80 (App. F-15). *See also id.* at ¶ 114 (App. F-21). This allegation, which apparently is intended to suggest that the Clerk "causes" appellants' inability to vote for Representatives, necessarily assumes that the Clerk's certificate vests the States (and the District of Columbia, in appellants' view) with a legal entitlement to a particular number of Representatives under 2 U.S.C. § 2a. This is incorrect.

The statute itself provides that that entitlement results from the President's statement to Congress, not from the Clerk's transmission of certificates. "Each State shall be entitled . . . to the number of Representatives shown in the [President's] statement." 2 U.S.C. § 2a(b). Furthermore, this Court made clear in *Franklin v. Massachusetts,* 505 U.S. 788, 799 (1992), that "it is the President's personal transmittal of the report to Congress that settles the apportionment . . . ." *See also id.* at 796 ("Only after the President reports to Congress do the States have an entitlement to a particular number of Representatives."); *id.* at 798 ("It is not until the President submits the information to Congress that the target stops moving, because only then are the States entitled by § 2a to a particular number of Representatives.").

The Clerk's role in the apportionment process is merely to transmit figures that Congress receives from the President, after the apportionment is complete. *See* 2 U.S.C. § 2a(b).[7] Therefore, appellants' inability to vote for Representatives cannot "fairly [] be traced," in any meaningful sense of the word, to the Clerk's mere transmission of certificates. *Simon v.*

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[7] Therefore, appellants' allegation that the Clerk "certifies" apportionments, to the extent "certifies" was intended to connote some notion of "creating an entitlement to," is factually and legally inaccurate.

Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976). Put another way, appellants' injury would occur when the President reports to Congress, regardless of whether or not the Clerk transmitted apportionment certificates. Accordingly, appellants cannot demonstrate any possibility—let alone the "substantial probability" they are required to show—that their injury would not occur but for the Clerk's conduct. *Warth*, 422 U.S. at 504.[8]

Although the Clerk was a named defendant in both *Franklin* and *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442 (1992), those decisions do not compel a contrary conclusion here. In both cases, the Clerk advised the Court that he would not present a defense (since executive branch officials were prepared to vigorously defend on the merits), and formally agreed to be bound by any judgment rendered.[9] As a result, neither *Franklin* nor *Montana*—both of which preceded *Steel Co.'s* unequivocal reaffirmation that federal courts must resolve jurisdictional questions before turning to

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[8] As noted above, the Clerk affirmed in a sworn declaration in this case that "[i]n carrying out this responsibility [to transmit apportionment certificates], the Clerk does not determine the number of Representatives to which each State is entitled. Rather, the Clerk's responsibility is limited to informing the executive of each State of the number of Representatives to which the State is entitled, as shown in the President's statement." Carle Declaration at ¶ 2. Appellants did not even attempt to contest this statement which is, therefore, factually undisputed.

[9] *See Massachusetts v. Mosbacher*, 785 F. Supp. 230, 233 n.1 (D. Mass.) (Clerk "stipulated that he will be bound by the judgment entered."), *rev'd sub nom. Franklin v. Massachusetts*, 505 U.S. 788 (1992); Stipulation in *Montana v. U.S. Dep't of Commerce*, No. CV-91-22-H-CCL (D. Mont.) (July 1, 1991) (Clerk "neither objects nor consents to the relief requested by the plaintiffs . . . [but agrees that he] shall be bound by any judgment, preliminary injunction or temporary restraining order entered in this case."), attached in Addendum (p. 7a) to Memorandum of Points of Authorities in Support of the Motion to Dismiss of Defendants [House Officers] and Opposition to Plaintiffs' Motion for Summary Judgment in

the merits—even discussed, much less decided, the question of plaintiffs' standing to sue the Clerk in apportionment-related cases.

2. *The Clerk Cannot Redress Appellants' Injury.*

Redressability turns on the connection between the asserted injury and the judicial relief sought, that is, the "likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103. *See also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978) (plaintiff must show a "'substantial likelihood' that the relief requested will redress the injury claimed."). Here, the only relief appellants seek from the Clerk is an injunction prohibiting him from

> certify[ing] to any State [more than one] Representative[] . . . until such time as the District of Columbia . . . is admitted as a sovereign State on equal footing with all other sovereign States . . . or until such time as the District of Columbia . . . is unified with a previously-existing sovereign State . . . .

Complaint at 26, ¶ C.2a (App. F-25 to F-26). Such an injunction would not "redress" appellants' injury for at least three reasons.

First, as explained above, the Clerk's transmission—or "certification" to use appellants' mistaken term—of apportionment certificates is not the apportionment itself, does not affect the States' (or the District of Columbia's) entitlement to a particular number of Representatives, and does not prevent appellants from electing Representatives. Therefore, the literal injunction appellants seek—while it might create havoc for the House and the country as a whole—would not redress their injury because it would not enable them to vote for Representatives.

Second, redressability is not established where a favorable outcome for a plaintiff "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Asarco, Inc. v. Kadish*, 490 U.S. 605, 615 (1989). This is precisely such a case because the ultimate relief appellants seek—statehood for the District or reunification with Maryland—requires action by Congress, a party not before the Court, and a party "whose exercise of broad and legitimate discretion" this Court may not "presume to control or predict."[10] Reunification with Maryland would require, in addition, the consent of that State.[11] Like the Congress, Maryland is not before the Court, and it is a party "whose exercise of broad and legitimate discretion" the Court may not "presume to control or predict."

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[10] While appellants implicitly assume that Congress could constitutionally legislate in the manner they desire, there is a substantial argument to the contrary. Legislation granting statehood to the District or reunifying the District with Maryland would appear to be inconsistent with the 23rd Amendment. That amendment, which recognizes the District as a permanent non-state entity and provides for at least three presidential electors for the District, may be nullified only by another constitutional amendment. *See generally* Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 Geo. Wash. L. Rev. 475, 480 (1992) ("The Twenty-third Amendment cannot be ignored. If it is to be eliminated, a constitutional amendment is required. Accordingly, any D.C. statehood legislation should be made contingent upon the repeal of the Twenty-third Amendment.").

[11] *See* U.S. Const. art. IV, § 3, cl. 1. *See also Phillips v. Payne*, 92 U.S. 130 (1876), *M'Laughlin v. Janney*, 47 Va. 609 (1850), and 124 Cong. Rec. 14357-63 (1978) (all describing the 1846 retrocession to Virginia of part of the District of Columbia, including the passage of two bills in the Virginia legislature, the first expressing the Commonwealth's willingness to accept the retrocession, and the second re-annexing, and extending the Commonwealth's jurisdiction to, the retroceded land).

Finally, appellants are unable to satisfy the redressability prong of the standing test because the Courts lack the authority to grant the injunctive relief appellants seek. Absent a finding that 2 U.S.C. § 2a(b) is unconstitutional—which appellants have not alleged and which is not part of their claim for relief—no Court would have the authority to enjoin the Clerk from discharging his duties under that statute. Because the Courts cannot provide the relief appellants seek, appellants cannot show any likelihood—let alone a "substantial likelihood," *Duke Power Co.*, 438 U.S. at 75 n.20—that the requested relief will redress their injury. *See, e.g., Ash Creek Mining v. Lujan*, 969 F.2d 868, 876 (10th Cir. 1992) (plaintiff lacks standing where "[n]o court can fashion an order redressing [its] alleged injuries because no court has the power [to order the relief sought].").[12]

B. Appellants Lacked Standing To Sue the Clerk, in His Role as Maker of the Roll, and the Sergeant at Arms.

Appellants' remaining standing allegations relate to the House Officers' statutory and House Rule-imposed responsibilities to elected Representatives: (1) the Clerk's responsibility to make the roll of Representatives-elect, and (2) the Sergeant at Arms' responsibility to control access to

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[12] Appellants' generalized request for a declaratory judgment that their constitutional rights have been violated, Complaint at 22-24, ¶¶ A, B (App. F-22 to F-24), does not solve the redressability problem. The "availability of declaratory relief depends on whether there is a live dispute between the parties." *Powell v. McCormack*, 395 U.S. 486, 517-18 (1969). *See also* 28 U.S.C. § 2201(a) (declaratory relief available only in "a case of actual controversy"). Because the House Officers' alleged conduct does not cause appellants' inability to vote for Representatives, as discussed above, there is not, and cannot be, a "live dispute" between appellants and the House Officers which would entitle appellants to declaratory relief against the House Officers.

the floor of the House. *See* Complaint at ¶¶ 82-83, 85-86, 115-16 (App. F-15, F-16, F-21). As with appellants' other standing claim, the House Officers' alleged failure to "include Representatives of the District of Columbia" in carrying out these responsibilities does not cause appellants' inability to vote for Representatives, nor would the relief appellants seek with respect to these responsibilities redress that injury.

1. *Appellants' Inability To Vote for Representatives Is Not Caused by the House Officers' Alleged Failure To Carry Out Their Responsibilities to Elected Representatives.*

Appellants' Article III injury—an inability to vote for Representatives—is plainly not traceable to the Clerk's failure to include District representatives on the roll and the Sergeant at Arms' "enforcement" of rolls which do not include District representatives. Complaint at ¶¶ 83, 86 (App. F-15, F-16). The Clerk's non-inclusion of a Member from the District of Columbia on the roll and the Sergeant at Arms' "enforcement" of the rolls occur *after* an election takes place. Therefore, they necessarily are a *consequence* of the fact that appellants do not elect Representatives, rather than being a *cause* of that injury. As Judge Oberdorfer held in *Alexander*, with respect to similar allegations against the Senate Officers:

> The plaintiffs' alleged injury is the denial of their right to vote for a member of the Senate. If the plaintiffs were to prevail on the merits, their injury simply would not be fairly traceable to the actions of the Senate defendants. Nothing that the Secretary of the Senate or the Sergeant of [sic] Arms and Doorkeeper of the Senate has done, or intends to do, would have substantially contributed to their injury.

Memorandum at 9 (March 20, 2000) (Oberdorfer, J.).

Furthermore, appellants' allegations mistake the House Officers for the House itself. The House Officers do not determine who is a Member for purposes of inclusion on the roll or admission to the floor. The House itself makes those determinations because only the House itself is "the Judge of the Elections, Returns and Qualifications of its own Members." U.S. Const. art. I, § 5, cl. 1.

The Clerk's preparation of the roll of Members, pursuant to 2 U.S.C. § 26, is an administrative function only:

> The Clerk's roll is the list of Members-elect, arranged alphabetically by states, which the Clerk prepares in advance of the convening of a new Congress based on the certificates of election received by his office. That particular roll is called only once, directly after the Congress convenes, in order to establish a quorum of Representatives-elect to proceed to the organization of the House.

L. Deschler, 1 *Deschler's Precedents of the United States House of Representatives* ch. 2, § 4 (1977). To prepare this roll, the Clerk reviews the certificates of election provided by the appropriate State officials to ensure that each certificate is in due form. Carle Declaration at ¶ 3. (The Clerk also reviews the certificates of election for the delegates-elect, including the Delegate from the District of Columbia, who are named separately from the Representatives-elect. *Id.*) However, preparation of the roll does not involve a determination of who is or is not entitled to be recognized as a Member. In the event of a challenge to the right of a Member- elect to be recognized, the matter is resolved by the House. *See* L. Deschler, 1 *Deschler's Precedents of the United States House of Representatives* ch. 2, § 6 (1977). Therefore, were an individual

to present himself to the House as the Member-elect from the District of Columbia, the House itself, not the Clerk, would determine whether he or she would be recognized. *See* Carle Declaration at ¶ 3.[13]

Appellants' contention is even weaker with respect to the Sergeant at Arms. He makes no independent determination of who is entitled to have access to the floor of the House and, indeed, does not even compile his own list of Members. Rather, the Sergeant at Arms simply relies on a Member list provided by the Clerk, derived from the roll, in performing his duty to control access to the House floor. *See* Livingood Declaration at ¶ 3.

The House's treatment of the Delegate from the District of Columbia further illuminates the fallacy of appellants' contention that the House Officers cause their injury. The District has for many years elected to the House a delegate (currently the Honorable Eleanor Holmes Norton). The delegate is admitted to the floor of the House as if she were a Member, Livingood Declaration at ¶ 2, and has the right of debate and all

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[13] For example, in November 1994, the House determined to seat Steve Largent of Oklahoma for the few days remaining in the 103rd Congress. Mr. Largent had been elected on election day in November 1994 to a seat in the 104th Congress. Shortly thereafter, James Inhofe (who had held the seat during the 103rd Congress) resigned, the governor of Oklahoma "appointed" Mr. Largent to fill Mr. Inhofe's unexpired term in the 103rd Congress, and questions were raised about whether the governor's "appointment" was consistent with Article I, § 2, cl. 4 of the Constitution. *See* 140 Cong. Rec. H11433-02 (1994).

At times, the House has recognized a Representative-elect even before the Clerk has received and reviewed the Representative-elect's certificate of election. *See, e.g.*, 143 Cong. Rec. H10000-02 (1997) (House, by unanimous consent, permitted Vito Fossella of New York—who was elected in a special election on the previous day to replace Representative Susan Molinari who had resigned—to take the oath of office even though "[Mr. Fossella's] certificate of election ha[d] not arrived") (statement of Rep. Armey).

other privileges granted to Representatives under Article I, § 6 of the Constitution (other than the right to vote in the House itself). *See* 2 U.S.C. § 25a.[14] Obviously, if the District's elected delegate is entitled to and *is in fact* (1) admitted to the floor of the House in accordance with House rules, and (2) included by the Clerk on a list of Members provided to the Sergeant at Arms (which list is derived from the roll), it makes absolutely no sense to suggest that the House Officers' alleged failure to perform these duties for the District's hypothetical elected Representative "causes" appellants to be unable to vote for Representatives.[15]

2. *The House Officers Cannot Redress Appellants' Injury.*

As noted above, redressability turns on the connection between the asserted injury and judicial relief sought, that is, "the likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103. The only specific relief appellants seek from the House Officers with respect to the discharge of their duties to elected Representatives is an order enjoining

> [the Clerk to] not enroll as members of the House of Representatives any more than [one Representative for] . . . each State . . . until

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[14] *See also* Rule III.3(a), Rules of the House of Representatives (106th Cong.) (delegate "elected to serve on standing committees in the same manner as Members of the House," and "possesses in such committees the same powers and privileges as the other Members," including the right to vote).

[15] *See also Kurtz v. Baker*, 829 F.2d 1133, 1142 (D.C. Cir. 1987) (nontheistic philosophy professor who challenged refusal of House and Senate chaplains to invite him to deliver nontheistic invocation before House and Senate satisfied Article III's injury requirement, but failed to satisfy causation element "because (1) there [was] no allegation that the chaplains had discretion to grant appellant's requests, and (2) such an allegation would in any event be untenable"). The same thing is true here.

> such time as the District of Columbia . . . is admitted as a sovereign State on equal footing with all other sovereign States . . . or until such time as the District of Columbia . . . is unified with a previously-existing sovereign State . . . .

Complaint at 27, ¶ C.2b (App. F-26); and enjoining

> [the Sergeant at Arms to] not admit to the Hall of the House of Representatives for sessions of the House any more than [one Representative for] . . . each State . . . until such time as the District of Columbia . . . is admitted as a sovereign State on equal footing with all other sovereign States . . . or until such time as the District of Columbia . . . is unified with a previously-existing sovereign State . . . .

Id. at 27-28, ¶ C.3 (App. F-27).

At best, such an order would hamstring the House Officers by creating conflicts with their obligations to the House. At worst, it would needlessly provoke a constitutional confrontation between the branches because only the House has the constitutional authority to determine whom to recognize as a Member. *See* U.S. Const. art. I, § 5, cl. 1. What such an order clearly would not do is redress appellants' injury because such an order would not provide them with the ability to elect Representatives.[16]

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[16] As we have discussed, appellants' attempt to rest their standing claim on the House Officers' alleged non-performance of their duties to elected Representatives mistakes some of the consequences of appellants' inability to vote for Representatives for the causes of that injury. It also fails to recognize that the Clerk's and Sergeant at Arms' duties to make the roll and control access to the House floor, respectively, are owed to, and performed only for, elected Representatives. Therefore, any failure to carry out those responsibilities could only injure an elected Representative—or someone claiming to be an elected Representative—as to whom those responsibilities

(continued)

II. The District Court's Judgment Dismissing Appellants' Apportionment Claims for Failure To State a Claim Should Be Affirmed.

In the alternative, the Court should affirm the judgment of the District Court dismissing appellants' apportionment claims for all the reasons stated in that Court's Memorandum Opinion.

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[16] (...continued)
were not performed. Appellants obviously are not, and do not claim to be, elected Representatives. That should be the end of the matter since "a litigant [ordinarily] must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Even in those rare cases where the Court has permitted a party to sue on behalf of a third party, there must exist, among other things, a "close relation" between the litigant and the third party, and "some hindrance to the third party's ability to protect his or her own interests." *Id.* at 411. To the extent appellants allege that they have standing to assert the rights of a third party (a hypothetical elected Representative from the District), the necessary third party does not even exist, so that the requisite "close relationship" and "hindrance" to that party's ability to protect his or her own interests also cannot exist.

CONCLUSION

For the reasons given, the House Officers' Motion to Affirm should be granted.

Respectfully submitted,

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